NO. 22195

United States Court of Appeals

NINTH CIRCUIT

MICHAEL ARTHUR DONOVAN,

Appellant,

vs.

ROBERT G. COCKINS, City Attorney of the City of Santa Monica, and ROBERT D. OGLE, Assistant City Attorney of the City of Santa Monica,

Appellees.

Appeal from the United States District Court,
Central District of California.

APPELLANT'S OPENING BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF JURISDICTION

This is a case arising under Section 1983, Title 42, United States Code, a claim of violation of civil rights protected by the U. S. Constitution committed while under color of law.

The case is a proper case for review by this Court under the provisions of Section 1291, Title 28, United States Code, since the judgment of dismissal as to Appellees is a final judgment of the District Court.

STATEMENT OF THE CASE

A. QUESTIONS PRESENTED

1) Are the City Attorney and Assistant City Attorney entitled to immunity from liability under 42 United States Code 1983, for discretionary acts done in the course and scope of their duties?

2) Does the complaint on file against Appellees state a claim on which relief can be granted?

B. MANNER OF RAISING QUESTIONS

On March 16, 1967, Appellant filed the complaint commencing on page 2 of the Record on Appeal. On April 21, 1967, Appellees filed a Notice of Motion and Motion for Summary Judgment. Said motion was granted by the HONORABLE E. AVERY CRARY, United States District Judge, on June 26, 1967, by dismissing the action against Appellees. This appeal is from that judgment of dismissal.

C. ABSTRACT OF FACTS

The facts of the case are that Appellant was employed by the City of Santa Monica as a Lifeguard up to April 6, 1963. The allegations of Appellant, plaintiff below, are that he was wrongfully discharged from such employment solely to effect punishment against him because he wrote and published newspaper articles in a local newspaper. The contents of such newspaper articles were, at times, critical, but true and fair political comment, of the City of Santa Monica and its administrators.

In April, 1964, the Personnel Board of the City of Santa Monica made findings, conclusions and recommendations:

Findings

"In 1962 and 1963 to the date of his removal, Michael A. Donovan was in the classified service of the City of Santa Monica. On April 6, 1963, he was removed from his position. On April 11, 1963, he requested a written statement of charges pursuant to Section 1110 of the Charter of the City. He never received the same, nor did the City at any time prepare any such written statement of charges."

Conclusions

"With the advice of its Attorney, the Board concludes that Section 1110 of the City Charter prohibits the appointing authority from introducing any evidence on the merits of the removal, and therefore concludes on the record before it that such removal was without just cause."

Recommendation

"That the said Donovan be reinstated."

Shortly thereafter, the next day, Appellant applied for work with the City of Santa Monica Lifeguards and was refused.

The refusal to re-employ after the determination by the Personnel Board above described was done on advice of the Appellees herein, acting under color of law in their capacities as City Attorney and Assistant City Attorney.

The internal law of the City of Santa Monica as set forth in Section 1110, Santa Monica Municipal Code, requires that a determination in favor of an employee be binding upon the City. (See copy attached to Affidavit of Robert G. Cockins contained in Record on Appeal, p. 17.)

SPECIFICATION OF ERRORS

Appellant contends that the Honorable Trial Court erred in the following particulars:

1) By concluding as a matter of law that Appellees are immune from liability under 42 United States Code 1983, as public officers performing discretionary and advisory acts within the course and scope of and in discharge of their official duties and authority as City Attorney and Assistant City Attorney.

2) By concluding as a matter of law that no claim was stated in the papers on file in the action as to defendants Cockins and Ogle, Appellees herein, under 42 United States Code 1983.

3) By entering judgment therein in favor of Cockins and Ogle.

STATEMENT OF LAW

I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

U.S.Constitution, First Amendment.

II

" . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws. . . ."

U.S.Constitution, Fourteenth Amendment.

III

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C.A. 1983.

IV

Congress has power to enforce the Fourteenth Amendment of the Constitution against those who carry the badge of authority of a state and represent it in some way, whether they act *in accordance* with their authority or *misuse it.*

Monroe v. Pape, (Ill. 1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492.

Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676.

V

The acts alleged in the complaint constitute acts done "under color of law," in that they were made possible only because Appellees were clothed with the authority of the applicable law.

Beauregard v. Wingard, (D.C. Cal. 1964) 230 F. Supp. 167.

U.S. v. Classic, (1941) 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368.

VI

A determination that governmental officers acted within the scope of their employment and authority is insufficient to

defeat a claim for relief under Civil Rights Statute, since the condition imposed by the statute of the officer's acting "under color" of state or territorial law contemplates that he was in official capacity, and to the extent that such officials violate or conspire to violate constitutional and federal rights, the doctrine of immunity is abrogated.

Birnbaum v. Trussel, (C.A. N.Y. 1965)
347 F. 2d 86.

VII

The case comes up upon the Honorable District Court's granting of Appellees' Motion for Summary Judgment, and in this context factual disputes must be resolved in the manner most favorable to the party opposing the motion.

Federal Rules of Civil Procedure,
Rule 56(c), 28 U.S.C.A.
U.S. v. Diebold, Incorporated, (1962)
369 U.S. 654, 82 S.Ct. 993, 8 L.Ed. 176.

VIII

The issue of immunity from liability of public officials was posed in the case of *Beauregard v. Wingard, supra,* (D.C. Cal. 1964) 230 F. Supp. 167.

The *Beauregard* case concerned itself with action taken "under color of law" by police officers in the City of Oceanside, California. The allegations were that Plaintiff Beauregard was desirous of becoming a city councilman in Oceanside and had entered the political arena for that purpose. During his campaign, he severely criticized the Chief of Police, demanding his removal, and generally criticized the conduct of the whole Police Department; that defendants conceived a plan to force plaintiff into a compromising act or position in order to give the false appearance that plaintiff had committed a crime, cause plaintiff to be arrested,

etc.; that plaintiff was arrested without warrant, conveyed to jail, charged with bookmaking; that plaintiff was acquitted after trial; and that such action by defendants was a deprivation of plaintiff's civil rights under the Fourteenth Amendment.

The defendants raised the same defense in *Beauregard* as do Appellees in the instant case; that they are immune from liability.

The Court held in *Beauregard*:

> "We have found no authoritative case law extending any common-law immunity to police officers in Civil Rights cases, and we *hold* that immunity cannot be urged by such officers as a defense to an action under Section 1983 of Title 42 U.S.C.A." (Emphasis added. *Id.*, at 174.)

IX

A conspiracy may be the basis for a claim under 42 United States Code 1983.

Hoffman v. Halden, 268 F. 2d 280.

ARGUMENT

A. IMMUNITY

It is clear from the many cases cited that both the language and purpose of the Civil Rights Act are inconsistent with the application of common law notions of official immunity in all suits brought under the act. The test imposed by the statute, that defendants' conduct must be done "under color of any statute, ordinance, regulation . . . " (42 United States Code 1983), can rarely, if ever, be satisfied in the case of anyone other than a state official.

A holding that state officials enjoy the same immunity

under the Civil Rights Act as they might enjoy in a suit under state law would "practically constitute a judicial repeal of the Civil Rights Act." *Hoffman v. Halden, supra,* 268 F. 2d 280, 300.)

B. CAUSE OF ACTION

The trial court held that the same facts as alleged in the complaint and as indicated in the Declaration of Appellant Donovan and Affidavit of Fred Bleecker, included in the Record on Appeal, were sufficient to constitute a cause of action as to other city officials of the City of Santa Monica, in that similar motions as to them were denied by the trial court. The statute sets forth the requirements for a cause of action. The reviewing court must construe the facts as alleged and as appear in the affidavits in the most favorable manner for Appellant. These facts indicate that:

1) Appellant was employed by the City of Santa Monica;

2) That he was discharged as a result of a conspiracy between all the defendants;

3) The purpose of his discharge was to punish him for publication of newspaper articles;

4) That he was entitled to resinstatement under applicable municipal law;

5) That he was refused reinstatement after administrative determination of his right;

6) That Appellees counselled the refusal.

Should attorneys, merely because they render an opinion, be relieved of liability when that opinion is part of a plan to deprive a citizen of constitutionally guaranteed rights? The Affidavit of Fred Bleecker delineates all elements of a cause of action under the Civil Rights Act. It is not improbable that,

but for the solace afforded by an opinion of the City Attorney, the other defendants would have lacked the fortitude to so ruthlessly and summarily discharge Appellant.

CONCLUSION

Appellees should be required to defend their high-handed conduct on its merits and not be dismissed summarily without a hearing. Appellant prays for an order reversing the Judgment of Dismissal as to Appellees.

Respectfully submitted,

NEWLAN, SHAPIRO AND BAILEY

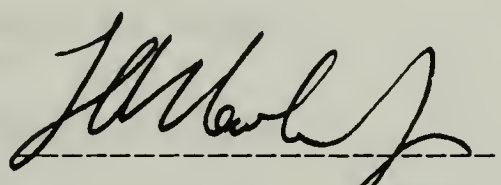
By L. A. NEWLAN, JR.

Attorneys for Appellant

CERTIFICATE

Rule 18-2(g)

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Attorney

PROOF OF SERVICE BY MAIL
1013a and 2015.5 C.C.P.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on December 16th, 1967, I served the within APPELLANT'S OPENING BRIEF (No. 22195 – Donovan v. Cockins and Ogle) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Robert G. Cockins, City Attorney
City of Santa Monica
and
Robert D. Ogle, Assistant City Attorney
City of Santa Monica
204 City Hall
Santa Monica, California [3 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16th, 1967, at Los Angeles, California.

M. A. Standefer

Subscribed and sworn to before me
this day of December, 1967.

_____

Notary Public in and for the
State of California.

Orig. & 20 copies – Clerk, United States Court of Appeals
For the Ninth Circuit
U.S. Post Office and Courthouse Bldg.
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